

Supreme Court of the United States

No. 72-331

Louis J. Lefkowitz, et al.,

Appellants,

v.

M. Russell Turley et al.

**APPEAL from the United States District Court for
the Western District of New York.**

**The statement of jurisdiction in this case having
been submitted and considered by the Court, probable
jurisdiction is noted.**

February 21, 1973

2-331

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FILED

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IN THE

Supreme Court of the United States

DAK, JR., CLERK

OCTOBER TERM 1971

No. 71- 72-331

LOUIS J. LEFKOWITZ, NELSON A. ROCKEFELLER,
B. JOHN TUTUSKA,

Appellants,

against

M. RUSSELL TURLEY and ROBERT H. STIEVATER,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

**JURISDICTIONAL STATEMENT FOR APPELLANTS
LEFKOWITZ AND ROCKEFELLER**

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No. 71-

LOUIS J. LEFKOWITZ, NELSON A. ROCKEFELLER,
B. JOHN TUTUSKA,

Appellants,

against

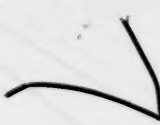
M. RUSSELL TURLEY and ROBERT H. STIEVATER,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

**JURISDICTIONAL STATEMENT FOR APPELLANTS
LEFKOWITZ AND ROCKEFELLER**

Appellants, Louis J. Lefkowitz and Nelson A. Rockefeller, appeal from a judgment and order of the United States District Court for the Western District of New York (statutory three-judge court) entered on May 1, 1972, declaring New York General Municipal Law, Sections 103-a and 103-b and New York Public Authorities Law, Sections 2601 and 2602, which provide for disqualification from public contracting for failure to sign a waiver of immunity, unconstitutional and enjoining their further enforcement.



Opinions Below

The decision and order of the three-judge court dated April 28, 1972 is not yet reported. It is annexed hereto as Appendix "A".

Jurisdiction

The order of the District Court was entered on May 1, 1972. The notice of appeal was filed on June 27, 1972.

The jurisdiction of this Court to review the instant case is conferred by 28 U.S.C. Section 1253.

Statutes Involved

New York General Municipal Law, Sections 103-a and 103-b and New York Public Authorities Law, Sections 2601 and 2602 are reproduced herein as Appendix "B".

Questions Presented

1. Whether a State may provide that persons who refuse to waive immunity before a grand jury investigating their contracts with a public authority shall be disqualified for five years from doing business with State and local government.
2. Whether, when a person has, as a condition of his public contract, agreed to waive immunity with respect to that contract, he may be disqualified for five years from doing business with State and local government.
3. Whether the record supports the sweeping result announced below.

Statement of the Case

Appellees are architects licensed to practice in the State of New York. At some time not set forth in the complaint, the appellees contracted to perform certain services for Erie County, New York in connection with the building of a domed stadium. On or about February 8, 1971, while still under contract, appellees were subpoenaed to appear before an Erie County Grand Jury investigating charges of conspiracy, bribery and larceny.

On that date, the Erie County District Attorney offered appellees waiver of immunity forms to execute if they chose. Both refused. Pursuant to New York General Municipal Law, Sections 103-a and 103-b, the District Attorney notified the Attorney General, the New York State Commissioner of Transportation, the Erie County Executive, the Erie County Attorney and the Erie County legislature of the refusals. The present action below followed.

Alleging that the statutes requiring each public service contract to contain a provision that the contractor agrees to waive immunity before a grand jury with respect to the contract (N.Y. General Municipal Law, Section 103-a; N.Y. Public Authorities Law, Section 2601) and the statutes providing for a five-year disqualification from public contracting on a refusal to execute such a waiver of immunity (N.Y. General Municipal Law, Section 103-b; N.Y. Public Authorities Law, Section 2602) were violative of their privilege against self-incrimination, appellees sought declaratory and injunctive relief in the court below. They contended that contracts then in force would be cancelled and that future contracts, which they desired to seek, would be barred to them. In a reply memorandum of law, appellees contended that the contract which was the subject of the grand jury investigation had not contained the clause required by statute.

A three-judge court for the Western District of New York consisting of Circuit Judge Feinberg and District

Judges Henderson and Curtin was convened. Recognizing that General Municipal Law, Section 103-b had been upheld in *United States ex rel. Laino v. Warden*, 246 F. Supp. 72 (S.D.N.Y. 1965), *aff'd* 355 F. 2d 208 (2d Cir. 1966), the Court nevertheless held without further inquiry that *Gardner v. Broderick*, 392 U.S. 273, *Uniformed Sanitation Men v. Commissioner*, 392 U.S. 280; *Garrity v. New Jersey*, 385 U.S. 493 and *Spevack v. Klein*, 385 U.S. 511 required a declaration of unconstitutionality because the statutes impose a penalty for assertion of the privilege against self-incrimination. Therefore, "(u)ntil rewritten so as to comply with constitutional standards" enforcement of the statutes challenged was enjoined. As a result, the State must continue to do business with contractors who will not be candid with it or must forego prosecution of contractors who render a criminal account of themselves.

ARGUMENT

The District Court has sharply curtailed the accountability of public contractors to the public. The scope of public recourse is a vital issue requiring review by this Court.

On the day that it decided *Gardner v. Broderick*, 392 U.S. 273 and *Uniformed Sanitation Men v. Commissioner*, 392 U.S. 280, this Court declined to reach the question of the validity of N.Y. Public Authorities Law, Section 2601 (*George Campbell Painting Corp. v. Reid*, 392 U.S. 286, 288). The Court below nevertheless held that *Gardner* and *Uniformed Sanitation Men* mandated the holding that Section 2601 and the analogous N.Y. General Municipal Law, Section 103-a are unconstitutional, and that the enforcement sections, Public Authorities Law, § 2602 and N.Y. General Municipal Law, § 103-b are also unconstitutional.

In undertaking to answer the question left open by this Court, the District Court failed to deal at all with the statutes which it held unconstitutional and failed to con-

sider the adverse impact which its decision must have on the ability of State and local government to hold its contractors to some kind of accounting. Public Authorities Law, Section 2601 and N.Y. General Municipal Law, Section 103-a require the insertion in public contracts of a clause by which the contractor, as a condition of receiving the contract, agrees to waive immunity with respect to the contract if summoned to testify. Not only was the validity of such clauses left open in *Campbell*, it was assumed in *Stevens v. Marks*, 383 U.S. 234. See also *Regan v. New York*, 349 U.S. 58.

The insertion of such clauses in public contracts is a traditional means of assuring contractor accountability both as to the quality of work and the hours by which it is done. See Wigmore, *Evidence*, Sections 2272, 2275 (McNaughton rev. 1961). *United States ex rel. Laino v. Wallack*, 246 F. Supp. 72 (S.D.N.Y. 1965), *aff'd* 355 F. 2d 208 (2d Cir. 1966). The District Court did not, except descriptively, allude to the contract requirement or its vital function. To obtain an economic benefit by securing contracts let by competitive bidding, contractors agree to waive any claim of immunity with respect to such contracts. Of course, waiver of immunity is not itself a forbidden act nor is its request unconstitutional. See *Stevens v. Marks*, *supra*.

At the time the contract is offered the contractor has the option to agree or refuse. The only thing he loses by refusal is future economic gain from this source. Once he agrees to the terms of the contract and accepts its benefits, he must comply with it or it is breached. He cannot accept the benefits and disregard the obligations. *Fahey v. Maloney*, 332 U.S. 245, 255-56; *Ashwander v. Tennessee Valley Authority*, 298 U.S. 288, 348 (concurring opinion); *Booth Fisheries v. Industrial Comm.*, 271 U.S. 208; *Buck v. Kuykendall*, 267 U.S. 307. See also *United States v. Field*, 193 F. 2d 92 (2d Cir. 1951), *cert. den.* 342 U.S. 894, upholding contempt convictions of bail bondsmen who refused to reveal their records. The majority in

Field pointed out that the bondsmen had waived by contract any right to withhold such information, and that they had undertaken a position of trust in relation to the Court. Waiver by contract is, thus, a valid means of securing accountability and the cavalier disregard by the Court below of the very existence of the contract clause waiver requires scrutiny by this Court.

Not only did the Court fail to deal with the question of whether a waiver can be effected by contract but it also failed to deal with the distinction between public employment and licenses on the one hand and public contracting on the other. The public employee (*Gardner v. Broderick, supra*) and the person who depends for his livelihood on a government license (*Spevack v. Klein*, 385 U.S. 511) are not in the same position as a contractor for whom government contracting is merely one of several possible sources of income. Appellees, for example, are licensed architects. There is no question of their being deprived of those licenses. The only matter at issue is their right to existing public contracts and to public contracts for the next five years. The waiver they were asked to sign is the direct result of voluntary contracting. No public employment or licensing standard carries such terms.

No privilege was waived in this case and no testimony was compelled. See *Wyman v. James*, 400 U.S. 309, 317-18. The only result was the one for which appellees had opted. Under no analysis can the exercise of that option be deemed an impermissible burden on the privilege against self-incrimination.

It cannot be denied that the interest of the State in being able effectively to investigate the responsibility of its contractors is one of overwhelming importance. Nor is it unreasonable for the State to seek information, even incriminating information, from those contracting with it who may have defrauded it. If contractors do not wish to provide such cooperation, their privilege against self-incrimination assures that they need not. But there

should be no further obligation on the part of the State to use and pay for the services of contractors who will not be candid with it. See, Memorandum of the Governor, N.Y. State Legislative Annual (1959), p. 431. The State in exchange for public bidding must be afforded the right to fix the terms and conditions to prevent and terminate possible frauds and collusion. See *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 126-127. See also 41 C.F.R. § 1-1.317 (1965) (Federal Procurement Regulations). The "rock and the whirlpool" dilemma faced by the recalcitrant contractor is no more real than that faced by the State which, to secure an accounting, must grant immunity from use of the information received.* However the balance may tip when one side of the equation is the right to a livelihood, the result where contracting is at issue must be the right either to an accounting or to a severing of the business relationship. The ultimate option is with the contractor just as the initial option was.

Even assuming *arguendo* that appellees' privilege against self-incrimination was impermissibly burdened, the decision to enjoin the General Municipal and Public Authorities Law was incorrect on the record before the District Court. In the first place appellees claimed below that their contract did not contain the clause required by Section 103-a. The contract itself was not introduced; the District Court made no finding of fact as to whether the clause was or was not present. Surely, the record was totally inadequate for the sweeping holding announced below. If the clause in fact was not present then it was incumbent on the Court to determine if the clause had to be read into the contract by virtue of the statute, or whether there had been a violation of State law. If the clause did not apply then the statute

* Transfer of the inquiry to an administrative body does not alter the situation since immunity must still be granted to secure the information desired. See *Gardner v. Broderick*, *supra* at 278; *Uniformed Sanitation Men v. Commissioner of Sanitation*, *supra* at 284.

was not complied with. The court was therefore without jurisdiction to consider statutory validity, being limited rather to the question of whether what in fact was done was a violation of rights.

Second, by enjoining the total operation of the statutes the District Court has made them inapplicable even to corporations which do the bulk of State contracting and has overruled the decision of this Court in *George Campbell Painting Corp. v. Reid*, *supra*. The question of corporate accountability is also involved in *Holland v. Hogan*, 392 U.S. 654 which is still pending after the remand by this Court.

Finally, by enjoining these statutes "until rewritten" the Court failed to allow for the fact that the revision of other statutes might validate the statutes under attack. In fact, that is what has happened in New York. Between 1953 and 1971 New York's immunity statute required that the privilege be claimed with respect to each question asked, leading to the dilemma that even testimony under an invalid waiver would not lead to immunity. See *Stevens v. Marks*, 383 U.S. 234, 241-42. This was the statute under which appellees were called. However, since they did not testify and since *Stevens* had been decided that dilemma did not face them. But effective September 1, 1971, New York returned to the automatic immunity scheme in existence before 1953. (N.Y. Criminal Procedure Law, Section 190.40). Waivers under this scheme were upheld by this Court in *Regan v. New York*, *supra* which was approved in *Stevens v. Marks*, *supra*. Accordingly, even if appellees were entitled to some relief the injunction was overbroad and not necessary to protect any rights of appellees.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court note probable jurisdiction and grant plenary consideration to the instant appeal.

Dated: New York, New York, August 23, 1972

Respectfully submitted,

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BRENDA SOLOFF
Assistant Attorney General
of Counsel

Appendix "A".

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

Civ—1971-80

M. RUSSELL TURLEY & 1

v.

LOUIS J. LEFKOWITZ, et al.

SIR:

Take notice of an ORDER, of which the within is a copy, duly granted in the within entitled action on the 28th day of April, 1972, and entered in the Office of the Clerk of the United States District Court, Western District of New York, on the 1st day of May, 1972.

Dated: Buffalo, New York, May 1, 1972.

JOHN K. ADAMS, Clerk
U.S. District Court
U.S. Courthouse
Buffalo, New York 14202

To Richard O. Robinson
Attorney for Plaintiff

To Louis J. Lefkowitz (Alb.)
Attorney for Defendants-Lefkowitz & Rockefeller

To James L. Magavern
Attorney for Defendant-Tutuska

FEDERAL RULES OF CIVIL PROCEDURE 77(d)

Appendix "A"

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

Civil 1971-80

M. RUSSELL TURLEY, ROBERT H. STIEVATER,
Plaintiffs,

vs.

LOUIS J. LEFKOWITZ, NELSON A. ROCKEFELLER,
B. JOHN TUTUSKA,
Defendants.

Before WILFRED FEINBERG, *Circuit Judge*, and JOHN O. HENDERSON and JOHN T. CURTIN, *District Judges*.

APPEARANCES: Robinson and Speller (Richard O. Robinson, of Counsel), Buffalo, New York, for Plaintiffs.

Louis J. Lefkowitz, Attorney General of the State of New York (Douglas S. Dales, Jr., Assistant Attorney General, of Counsel), Albany, New York, for Defendants Lefkowitz and Rockefeller.

James L. Magavern, Erie County Attorney (Justyn E. Miller, Assistant County Attorney, of Counsel), Buffalo, New York, for Defendant Tutuska.

CURTIN, *District Judge*:

The plaintiffs in this action are licensed architects who have in the past been employed by various municipalities

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and state and county agencies in New York. In February, 1971 they were called to testify before the holdever January, 1971 Erie County Grand Jury. At that time both were requested to sign waivers of immunity, and each declined while asserting his Fifth Amendment privilege against self-incrimination. Thereafter, in February, 1971, the Erie County District Attorney sent the following letter to the County Executive, County Attorney, County Legislature, State Attorney General, State Commissioner of Transportation, and the plaintiffs' architectural firm:

Please be advised that the following persons were subpoenaed to appear before the January, 1971 Hold-over Erie County Grand Jury to testify with regard to an investigation concerning transactions and contracts that they had with the County of Erie, a political subdivision of the State of New York:

J. Lloyd Walker
M. Russell Turley
Robert H. Stievater

Pursuant to said subpoenas they were individually asked to sign a Waiver of Immunity against subsequent criminal prosecution and each refused. Mr. Walker was nonetheless called before the Grand Jury and has testified with immunity. Mr. Turley and Mr. Stievater, upon their respective refusals to sign such a waiver, were excused and have not been called before the Grand Jury.

Your attention is called to Article 5-A pertaining to Public contracts as recited in the General Municipal Law, and more specifically, Sections 103-A and 103-B, pertaining to cancellations of existing contracts and disqualifications of future contracts and awards with any political subdivision of the State of New York.

• • • • •

Appendix "A"

Claiming that the defendants now threaten to nullify the plaintiffs' employment opportunities and contractual rights plaintiffs pray for a judgment declaring Sections 103-a¹ and 103-b² of the New York General Municipal Law and Sections 2601³ and 2602⁴ of the New York Public Authorities Law violative of plaintiffs' Fifth Amendment rights. Since they further seek a permanent injunction against the operation of the above statutes, a three judge panel was convened to hear argument.

Each of the sections which plaintiffs attack was added to the laws of New York in 1959. Their background is recited in detail in *United States ex rel. Laino v. Warden of Wallkill Prison*, 246 F.Supp. 72, 92-99 (S.D.N.Y. 1965), aff'd per curiam, 355 F.2d 208 (2d Cir. 1966), wherein an attack on the constitutionality of Section 103-b was unsuccessful. Aside from minor variations in language, the statutes are essentially identical. Generally, they provide that in all contracts awarded by a municipality or public authority of the state for work or services, a clause must be inserted to provide that, upon refusal of a person to testify before a grand jury, to answer any relevant question, or to waive immunity against subsequent criminal prosecution, such person and any firm of which he is a member shall be disqualified for five years from contracting with any municipality or public authority, and any existing contracts may be cancelled by the municipality or public authority without incurring penalty.

The narrow issue before the court is whether plaintiffs' "testimony was demanded before the grand jury in part so that it might be used to prosecute [them], and not solely for the purpose of securing an accounting of [their] performance of [their] public trust". See *Gardner v. Bröderick*, 392 U.S. 273, at 279 (1968). In view of the Supreme Court's decision in *Gardner* and a number of other cases, discussed below, the proper resolution of the question is not difficult.

Appendix "A"

In *Garrity v. New Jersey*, 385 U.S. 493 (1967), the court held that statements made by police officers during an investigation by the state attorney general into the alleged fixing of traffic tickets were inadmissible since the choice given to them—either to forfeit their jobs or incriminate themselves—violated their constitutional privilege against self-incrimination. On the same day, in *Spevack v. Klein*, 385 U.S. 511 (1967), the court decided that New York could not disbar a lawyer solely for refusing, on the basis of the privilege against self-incrimination, to produce financial records and to testify at a judicial inquiry.

In *Gardner*, the court clearly set out the controlling principle. While a state may not discharge a public employee for refusing to waive a right which the Constitution guarantees to him, such a discharge would be without constitutional prohibition if, without being required to waive his immunity, the public employee fails to answer questions relevant to the performance of his official duties. The point was reiterated in *Uniformed Sanitation Men v. Commissioner*, 392 U.S. 280, at 284-85 (1968):

As we stated in *Gardner* . . . if New York had demanded that petitioners answer questions specifically, directly, and narrowly relating to the performance of their official duties on pain of dismissal from public employment without requiring relinquishment of the benefits of the constitutional privilege, and if they had refused to do so, this case would be entirely different. In such a case, the employee's right to immunity as a result of his compelled testimony would not be at stake. But here the precise and plain impact of the proceedings against petitioners . . . was to present them with a choice between surrendering their constitutional rights or their jobs. Petitioners as public employees are entitled, like all other persons, to the benefit of the Constitution, including the priv-

Appendix "A"

ilege against self-incrimination. . . . At the same time, petitioners, being public employees, subject themselves to dismissal if they refuse to account for their performance of their public trust, after proper proceedings, which do not involve an attempt to coerce them to relinquish their constitutional rights.

Quite clearly, then, the plaintiffs' disqualification from public contracting for five years as a penalty for asserting a constitutional privilege is violative of their Fifth Amendment rights. Equally clear is that, within the proper limits, public employees are not immune from being compelled to account for their official actions in order to keep their jobs. Until rewritten so as to comply with constitutional standards, Sections 103-a and 103-b of New York's General Municipal Law and Sections 2601 and 2602 of the New York Public Authorities Law are unconstitutional, and the defendants are enjoined from their further enforcement.

So ordered.

/s/ Wilfred Feinberg
U.S.C.J.

/s/ John O. Henderson
U.S.D.J.

/s/ John T. Curtin
U.S.D.J.

Dated: April 28, 1972

FOOTNOTES

¹ Section 103-a provides:

A clause shall be inserted in all specifications or contracts made or awarded by a municipal corporation or any public department, agency or official thereof on or after the first day of July, nineteen hundred fifty-nine or by a fire district or

Appendix "A"

any agency or official thereof on or after the first day of September, nineteen hundred sixty, for work or services performed or to be performed, or goods sold or to be sold, to provide that upon the refusal of a person, when called before a grand jury, head of a state department, temporary state commission or other state agency, the organized crime task force in the department of law, head of a city department, or other city agency, which is empowered to compel the attendance of witnesses and examines them under oath, to testify in an investigation concerning any transaction or contract had with the state, any political subdivision thereof, a public authority or with any public department, agency or official of the state or of any political subdivision thereof or of a public authority, to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question concerning such transaction or contract.

(a) such person, and any firm, partnership or corporation of which he is a member, partner, director or officer shall be disqualified from thereafter selling to or submitting bids to or receiving awards from or entering into any contracts with any municipal corporation or fire district, or any public department, agency or official thereof, for goods, work or services, for a period of five years after such refusal, and to provide also that

(b) any and all contracts made with any municipal corporation or any public department, agency or official thereof on or after the first day of July, nineteen hundred fifty-nine or with any fire district or any agency or official thereof on or after the first day of September, nineteen hundred sixty, by such person, and by any firm, partnership, or corporation of which he is a member, partner, director or officer may be cancelled or terminated by the municipal corporation or fire district without incurring any penalty or damages on account of such cancellation or termination, but any monies owing by the municipal corporation or fire district for goods delivered or work done prior to the cancellation or termination shall be paid.

The provisions of this section as in force and effect prior to the first day of September, nineteen hundred sixty, shall apply to specifications or contracts made or awarded by a municipal corporation on or after the first day of July, nineteen hundred fifty-nine, but prior to the first day of September, nineteen hundred sixty.

* Section 103-b provides:

Any person who, when called before a grand jury, head of a state department, temporary state commission or other state

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agency, the organized crime task force in the department of law, head of a city department or other city agency, which is empowered to compel the attendance of witnesses and examine them under oath, to testify in an investigation concerning any transaction or contract had with the state, any political subdivision thereof, a public authority, or with a public department, agency or official of the state or of any political subdivision thereof or of a public authority, refuses to sign a waiver of immunity against subsequent criminal prosecution or to answer and any relevant question concerning such transaction or contract, and any firm, partnership or corporation of which he is a member, partner, director or officer shall be disqualified from thereafter selling to or submitting bids to or receiving awards from or entering into any contracts with any municipal corporation or fire district, or with any public department, agency or official thereof, for goods, work or services, for a period of five years after such refusal or until a disqualification shall be removed pursuant to the provisions of section one hundred three-c of this article.

It shall be the duty of the officer conducting the investigation before the grand jury, the head of a state department, the chairman of the temporary state commission or other state agency, the organized crime task force in the department of law, the head of a city department or other city agency before which the refusal occurs to send notice of such refusal, together with the names of any firm, partnership or corporation of which the person so refusing is known to be a member, partner, officer or director, to the commissioner of transportation of the state of New York and the appropriate departments, agencies and officials of the state, political subdivisions thereof or public authorities with whom the person so refusing and any firm, partnership or corporation of which he is a member, partner, director or officer, is known to have a contract. However, when such refusal occurs before a body other than a grand jury, notice of refusal shall not be sent for a period of ten days after such refusal occurs. Prior to the expiration of this ten day period, any person, firm, partnership or corporation which has become liable to the cancellation or termination of a contract or disqualification to contract on account of such refusal may commence a special proceeding at a special term of the supreme court, held within the judicial district in which the refusal occurred, for an order determining whether the questions in response to which the refusal occurred were relevant and material to the inquiry. Upon the commencement of such proceeding, the sending of such notice of refusal to answer shall be subject to order of the court in

Appendix "A"

which the proceeding was brought in a manner and on such terms as the court may deem just. If a proceeding is not brought within ten days, notice of refusal shall thereupon be sent as provided herein.

^a Section 2601 provides:

A clause shall be inserted in all specifications or contracts hereafter made or awarded by any public authority or by any official of any public authority created by the state or any political subdivision, for work or services performed or to be performed or goods sold or to be sold, to provide that upon the refusal by a person, when called before a grand jury, head of a state department, temporary state commission or other state agency, the organized crime task force in the department of law, head of a city department, or other city agency, which is empowered to compel the attendance of witnesses and examine them under oath, to testify in an investigation concerning any transaction or contract had with the state, any political subdivision thereof, a public authority or with any public department, agency or official of the state or of any political subdivision thereof or of a public authority, to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question concerning such transaction or contract.

(a) such person, and any firm, partnership or corporation of which he is a member, partner, director or officer shall be disqualified from thereafter selling to or submitting bids to or receiving awards from or entering into any contracts with any public authority or official thereof, for goods, work or services, for a period of five years after such refusal, and to provide also that

(b) any and all contracts made with any public authority or official thereof, since the effective date of this law, by such person and by any firm, partnership or corporation of which he is a member, partner, director or officer may be cancelled or terminated by the public authority without incurring any penalty or damages on account of such cancellation or termination, but any monies owing by the public authority for goods delivered or work done prior to the cancellation or termination shall be paid.

^a Section 2602 provides:

Any person, who, when called before a grand jury, head of a state department, temporary state commission or other state agency, the organized crime task force in the department of law, head of a city department, or other city agency, which is empowered to compel the attendance of witnesses and ex-

Appendix "A"

amine them under oath, to testify in an investigation concerning any transaction or contract had with the state, any political subdivision thereof, a public authority or with a public department, agency or official of the state or of any political subdivision thereof or of a public authority, refuses to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant questions concerning such transaction or contract, and any firm, partnership or corporation, of which he is a member, partner, director or officer shall be disqualified from thereafter selling to or submitting bids to or receiving awards from or entering into any contracts with any public authority or any official of any public authority created by the state or any political subdivision, for goods, work or services, for a period of five years after such refusal or until a disqualification shall be removed pursuant to the provisions of section twenty-six hundred three of this title.

It shall be the duty of the officer conducting the investigation before the grand jury, the head of a state department, the chairman of the temporary state commission or other state agency, the organized crime task force in the department of law, the head of a city department or other city agency before which the refusal occurs to send notice of such refusal, together with the names of any firm, partnership or corporation of which the person so refusing is known to be a member, partner, officer or director, to the commissioner of transportation of the state of New York, or the commissioner of general services as the case may be, and the appropriate departments, agencies and officials of the state, political subdivisions thereof or public authorities with whom the persons so refusing and any firm, partnership or corporation of which he is a member, partner, director or officer, is known to have a contract. However, when such refusal occurs before a body other than a grand jury, notice of refusal shall not be sent for a period of ten days after such refusal occurs. Prior to the expiration of this ten day period, any person, firm, partnership or corporation which has become liable to the cancellation or termination of a contract or disqualification to contract on account of such refusal may commence a special proceeding at a special term of the supreme court, held within the judicial district in which the refusal occurred, for an order determining whether the questions in response to which the refusal occurred were relevant and material to the inquiry. Upon the commencement of such proceeding, the sending of such notice of refusal to answer shall be subject to order of the court in which the proceeding was brought in a manner and on such terms as the court may deem just. If a proceeding is not brought within ten days, notice of refusal shall thereupon be sent as provided herein.

APPENDIX "B"

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

Civil 1971-80

**M. RUSSELL TURLEY
ROBERT H. STIEVATER**

Plaintiffs

vs

**LOUIS J. LEFKOWITZ
NELSON A. ROCKEFELLER
B. JOHN TUTUSKA**

Defendants

DECISION & ORDER

**FEINBERG, Circuit Judge
HENDERSON, District Judge
CURTIN, District Judge**

GENERAL MUNICIPAL LAW

Section 103-a. Ground for cancellation of contract by municipal corporations and fire districts:

A clause shall be inserted in all specifications or contracts made or awarded by a municipal corporation or any public department, agency or official thereof on or after the first day of July, nineteen hundred fifty-nine or by a fire district or any agency or official thereof on or after the first day of September, nineteen hundred sixty, for work or services performed or to be performed, or goods sold or to be sold, to provide that upon the refusal of a person,

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when called before a grand jury, head of a state department, temporary state commission or other state agency, head of a city department, or other city agency, which is empowered to compel the attendance of witnesses and examine them under oath, to testify in an investigation concerning any transaction or contract had with the state, any political subdivision thereof, a public authority or with any public department, agency or official of the state or of any political subdivision thereof or of a public authority, to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question concerning such transaction or contract,

(a) such person, and any firm, partnership or corporation of which he is a member, partner, director or officer shall be disqualified from thereafter selling to or submitting bids to or receiving awards from or entering into any contracts with any municipal corporation, or fire district, or any public department, agency or official thereof, for goods, work or services, for a period of five years after such refusal, and to provide also that

(b) any and all contracts made with any municipal corporation or any public department, agency or official thereof on or after the first day of July, nineteen hundred fifty-nine or with any fire district or any agency or official thereof on or after the first day of September, nineteen hundred sixty, by such person, and by any firm, partnership, or corporation of which he is a member, partner, director or officer may be cancelled or terminated by the municipal corporation or fire district without incurring any penalty or damages on account of such cancellation or termination, but any monies owing by the municipal corporation or fire district for goods delivered or work done prior to the cancellation or termination shall be paid.

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The provisions of this section as in force and effect prior to the first day of September, nineteen hundred sixty, shall apply to specifications or contracts made or awarded by a municipal corporation on or after the first day of July, nineteen hundred fifty-nine, but prior to the first day of September, nineteen hundred sixty.

Section 103-b. Disqualification to contract with municipal corporations and fire districts:

Any person, who, when called before a grand jury, head of a state department, temporary state commission or other state agency, head of a city department or other city agency, which is empowered to compel the attendance of witnesses and examine them under oath, to testify in an investigation concerning any transaction or contract had with the state, any political subdivision thereof, a public authority, or with a public department, agency or official of the state or of any political subdivision thereof or of a public authority, refuses to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question concerning such transaction or contract, and any firm, partnership or corporation of which he is a member, partner, director or officer shall be disqualified from thereafter selling to or submitting bids to or receiving awards from or entering into any contracts with any municipal corporation or fire district, or with any public department, agency or official thereof, for goods, work or services, for a period of five years after such refusal or until a disqualification shall be removed pursuant to the provisions of section one hundred three-c of this article.

It shall be the duty of the officer conducting the investigation before the grand jury, the head of a state department, the chairman of the temporary state commission or other state agency, the head of a city department or other city agency before which the refusal occurs to send notice

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of such refusal, together with the names of any firm, partnership, or corporation of which the person so refusing is known to be a member, partner, officer or director, to the commissioner of transportation of the state of New York and the appropriate departments, agencies and officials of the state, political subdivisions thereof or public authorities with whom the person so refusing and any firm, partnership or corporation of which he is a member, partner, director or officer, is known to have a contract. However, when such refusal occurs before a body *other* than a grand jury, notice of refusal shall not be sent for a period of ten days after such refusal occurs. Prior to the expiration of this ten day period, any person, firm, partnership or corporation which has become liable to the cancellation or termination of a contract or disqualification to contract on account of such refusal may commence a special proceeding at a special term of the supreme court, held within the judicial district in which the refusal occurred, for an order determining whether the questions in response to which the refusal occurred were relevant and material to the inquiry. Upon the commencement of such proceeding, the sending of such notice of refusal to answer shall be subject to order of the court in which the proceeding was brought in a manner and on such terms as the court may deem just. If a proceeding is not brought within ten days, notice of refusal shall thereupon be sent as provided herein.

PUBLIC AUTHORITIES LAW**Article 9—General Provisions****(Title 3-A—Contracts of Public Authorities)**

Section 2601. Ground for cancellation of contract by public authority:

A clause shall be inserted in all specifications or contracts hereafter made or awarded by any public authority

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or by any official of any public authority created by the state or any political subdivision, for work or services performed or to be performed or goods sold or to be sold, to provide that upon refusal by a person, when called before a grand jury, head of a state department, temporary state commission or other state agency, head of a city department, or other city agency, which is empowered to compel the attendance of witnesses and examine them under oath, to testify in an investigation concerning any transaction or contract had with the state, any political subdivision thereof, a public authority or with any public department, agency or official of the state or of any political subdivision thereof or of a public authority, to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question concerning such transaction or contract,

(a) such person, and any firm, partnership or corporation of which he is a member, partner, director or officer shall be disqualified from thereafter selling to or submitting bids to or receiving awards from or entering into any contracts with any public authority or official thereof, for goods, work or services, for a period of five years after such refusal, and to provide also that

(b) any and all contracts made with any public authority or official thereof, since the effective date of this law, by such person and by any firm, partnership or corporation of which he is a member, partner, director or officer may be cancelled or terminated by the public authority without incurring any penalty or damages on account of such cancellation or termination, but any monies owing by the public authority for goods delivered or work done prior to the cancellation or termination shall be paid.

*Appendix "B"***SECTION 2602. Disqualification to contract with public authority:**

Any person who, when called before a grand jury, head of a state department, temporary state commission or other state agency, head of a city department, or other city agency, which is empowered to compel the attendance of witnesses and examine them under oath, to testify in an investigation concerning any transaction or contract had with the state, any political subdivision thereof, a public authority or with a public department, agency or official of the state or of any political subdivision thereof or of a public authority, refuses to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question concerning such transaction or contract, and any firm, partnership or corporation, of which he is a member, partner, director, or officer shall be disqualified from thereafter selling to or submitting bids to or receiving awards from or entering into any contracts with any public authority or any official of any public authority created by the state or any political subdivision, for goods, work or services, for a period of five years after such refusal or until a disqualification shall be removed pursuant to the provisions of section twenty-six hundred three of this title.

It shall be the duty of the officer conducting the investigation before the grand jury, the head of a state department, the chairman of the temporary state commission or other state agency, the head of a city department or other city agency before which the refusal occurs to send notice of such refusal, together with the names of any firm, partnership or corporation of which the person so refusing is known to be a member, partner, officer or director, to the commissioner of transportation of the state of New York, or the commissioner of general services as

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the case may be, and the appropriate departments, agencies and officials of the state, political subdivisions thereof or public authorities with whom the persons so refusing any firm, partnership or corporation of which he is a member, partner, director or officer, is known to have a contract. However, when such refusal occurs before a body other than a grand jury, notice of refusal shall not be sent for a period of ten days after such refusal occurs. Prior to the expiration of this ten day period, any person, firm, partnership or corporation which has become liable to the cancellation or termination of a contract or disqualification to contract on account of such refusal may commence a special proceeding at a special term of the supreme court, held within the judicial district in which the refusal occurred, for an order determining whether the questions in response to which the refusal occurred were relevant and material to the inquiry. Upon the commencement of such proceeding, the sending of such notice of refusal to answer shall be subject to order of the court in which the proceeding was brought in a manner and on such terms as the court may deem just. If a proceeding is not brought within ten days, notice of refusal shall thereupon be sent as provided herein.

